UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLARICE S. POPE,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	CIVIL ACTION NO. H-03-3968
	§	
JO ANNE B. BARNHART,	§	
Commissioner, Social	§	
Security Administration,	§	
	§	
Defendant.	§	

MEMORANDUM AND ORDER

Before the court is Plaintiff Clarice S. Pope's motion for attorney fees (Dkt. No. 23), brought pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. For the reasons explained below, the motion is GRANTED IN PART, with limitation to those hours reasonably expended.

Pope successfully obtained remand of the Commissioner's denial of her claim for Social Security benefits pursuant to the fourth sentence of 42 U.S.C. § 405(g). Pope now timely requests a total award of $15,967.47 for attorney's fees, calculated at the rate of $125 per hour for 125.75 attorney hours, and $248.72 in expenses. The Commissioner does not object to the awarding of fees, but does object to the number of hours submitted as excessive, and also contests several expenses claimed. The Commissioner asserts a more appropriate amount is $5,775.00, reflecting a total of 45 hours, with an additional $150.00 for expenses.

"The EAJA, 28 U.S.C. § 2412(d)(1)(A), requires an award of attorney's fees to a claimant against the Government if: (1) the claimant is a 'prevailing party'; (2) the Government's position was not 'substantially justified'; and (3) there are no special circumstances making the award unjust." *Davidson v. Veneman*, 317 F.3d 503, 506 (5th Cir. 2003) (citations omitted). A plaintiff is a

"prevailing party" under the EAJA if she succeeds on any significant issue in litigation which achieves some of the benefit she sought in bringing the suit. *See id.* A party such as Pope, who obtains a remand pursuant to the fourth sentence of 42 U.S.C. § 405(g), qualifies as a prevailing party for purposes of attorney's fees under the EAJA. *Breaux v. U.S. Dep't of Health & Human Servs.*, 20 F.3d 1324, 1325 (5th Cir. 1994). The burden of proving "substantial justification" rests on the government. *See Davidson*, 317 F.3d at 506. The Commissioner has neither asserted that her position was substantially justified, nor claimed that there are any special circumstances that would render the award of attorney's fees unjust.

EAJA fees are generally determined by the time expended and the attorney's hourly rate, capped at $125 per hour. *See* 28 U.S.C. §§ 2412(d)(1)(B), 2412(d)(2)(A). A higher fee may be justified by showing special circumstances, but Pope's counsel has made no such request. An itemized statement of attorney time and expenses has been submitted, as required by 28 U.S.C. § 2412(d)(1)(B). *See* Dkt. No. 24.

I. Hours

Counsel for Pope seeks reimbursement for 125.75 hours–40.75 hours for himself and 85 hours for briefing attorney Nora Wolfe Few. The Commissioner objects that these hours are excessive and should be reduced to 45 hours.

The court has discretion in determining the amount of a fee award, including the reasonableness of the hours claimed by the prevailing party. *See Hensley v. Eckerhart*, 461 U.S. 424, 433-37 (1983); *see also Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 161 (1990) (*Hensley* standard applies to EAJA fee requests). The party seeking an award of fees should submit evidence supporting the hours worked. *Hensley*, 461 U.S. at 433. The court then excludes hours not

"reasonably expended," that is to say, those hours that are excessive, redundant, or unnecessary, and those hours that would not be properly billed to one's client in a private setting. *Id.* at 434.

A review of numerous cases does suggest that the 125.75 hours requested is very much at the high end of the spectrum, and that the Commissioner's concern over the number of hours submitted for compensation is therefore well-founded. *See, e.g., Rodriquez v. Bowen*, 865 F.2d 739, 747 n.4 (6th Cir. 1989) (*en banc*) (citing an "in-house" survey encompassing seven years of data that the average number of hours asserted in fee petitions was 37.3); *Nugent v. Massanari*, 2002 WL 356656, at *2 (N.D. Ca. 2002) (reviewing EAJA cases suggesting the borderline for reasonableness is in the forty-hour range); *Patterson v. Apfel*, 99 F. Supp. 2d 1212, 1214 n.2 (C.D. Ca. 2000) (surveying numerous cases suggesting a customary range between twenty and fifty hours); *Hardy v. Callahan*, 1997 WL 470355, at *9 n.10 (E.D. Tex. 1997) (awarding fees for forty hours rather than the requested 58.5 because the case did not involve any factually or legally complex issues, and explaining that forty hours is an appropriate average); *Hutchinson v. Chater*, 1996 WL 699695, at *3 (D. Kan. 1996) ("The typical EAJA fee application in social security cases claims between thirty and forty hours"); *Pribek v. Secretary, Dep't of Health & Human Servs.*, 717 F. Supp 73, 75 (W.D.N.Y. 1989) (forty hours adequately reflects a reasonable expenditure of time on an unextraordinary case); *DiGennaro v. Bowen*, 666 F. Supp. 426, 433 (E.D.N.Y. 1987) (compensated hours generally range from twenty to forty hours); *see also Commissioner, I.N.S v. Jean*, 496 U.S. 154, 161 n.9 (out of 502 fee applications under the EAJA in 1989, 413 were granted, averaging around $4482.00 per award). Other cases also suggest that a reasonable amount of time for research and drafting is much less than the amount requested by plaintiff's counsel. *See, e.g., Gustafson v. Barnhart*, 2002 WL 771753, at *4 (D. Minn. 2002) (explaining that prior case law approved between

13-15 hours for legal research and writing); *Baker v. Bowen*, 707 F. Supp. 481, 486 (D. Wyo. 1989) (finding 14.60 hours requested by an experienced Social Security practitioner for legal research and drafting somewhat excessive).

Cases relied upon by counsel, *Martin v. Heckler*, 754 F.2d 1262 (5th Cir. 1985) (awarding compensation under the EAJA for 122.10 hours) and *Squires-Allman v. Callahan* (S.D. Tex. Dkt. No. 4:92-cv-03230) (129 hours), basing award on higher hours are not persuasive. In *Martin*, the Fifth Circuit granted fees for 122.10 hours performed before the district court. *Martin*, 754 F.2d at 1265. The court noted that "These claimed fees and expenses are supported by a detailed contemporary itemization, broken down by the quarter hour, of the work performed." *Id.* However, it is important to note that the Secretary of Health and Human Services did not dispute the "quantum" nor the reasonableness of the amounts requested by Martin. *Id.* Thus, unlike the cases cited above, reasonableness of the requested fees was not contested.

And *Squires-Allman* merely offers a one-sentence order that states in its entirety: "Norma J. Squires-Allman is awarded attorney's fees of $16,125 (129 hours at $125 an hour) and costs of $270." There is no background or discussion regarding the figure arrived at, so the order is of little guidance. Thus, *Martin* and *Squires-Allman* do not offer compelling guideposts here. The court recognizes that Social Security appeals are fact intensive, and that counsel has an ethical and professional obligation to familiarize himself with the record and the law. However, 125.75 hours for these tasks is well beyond the range courts typically find reasonable under the EAJA, and beyond what the court finds justified in this case.

The Commissioner's point that this case did not involve issues of a novel or difficult nature is also well-founded and further reason to reduce the 125.75 hours. This case was remanded for two

main reasons: (1) the ALJ's finding that Pope could work at the light exertional level did not accord any weight to the substantial medical evidence showing Pope suffered from serious foot problems, and improperly dismissed Pope's allegation of pain based on prohibited inferences; and (2) the ALJ incorrectly applied exempted volunteer work in determining Pope's past relevant work. The improper assessment of credibility of witnesses and medical evidence, and the misapplication of regulations are routine legal issues in Social Security disability cases. *See Nugent v. Massanari*, 2002 WL 356656, at *3 (N.D. Ca. 2002); *Sandine v. Commissioner of Soc. Sec. Admin.*, 1999 WL 717823, at *4 (D. Or. 1999); *see generally* Harvey L. McCormick, *Social Security Claims and Procedures* § 15:7, at 214-15 (5th ed. 1998) (discussing common legal errors or applications of improper standards that constitute grounds for remand). Thus, the court finds that an across-the-board reduction of hours is warranted.

In addition to a general reduction in hours, the Commissioner has also pointed out certain items submitted for reimbursement are either duplicative or are not compensable under the EAJA. For instance, there is duplication of hours between counsel and Few, where counsel claims 12.5 hours spent reviewing the brief and reply prepared by Few, and reviewing the same materials examined by Few. Duplicative hours are not "reasonably expended" and therefore must be reduced. Moreover, Few submitted 2.5 hours for reimbursement for e-mailing the brief and the reply to counsel. Two and a half hours to e-mail two documents is clearly unreasonable; moreover, such ministerial and clerical tasks are not compensable under the EAJA. *See, e.g., Bielec v. Bowen*, 675 F. Supp. 200, 204 (D.N.J. 1987). There is also a listing for .5 hours to fax a document that is for similar reasons not compensable under the EAJA. Another .5 hours claimed by counsel to review the Commissioner's Motion for Enlargement of Time is unwarranted. *See Bowman v. Secretary of*

H.H.S., 744 F. Supp. 898, 899-901 (E.D. Ark. 1989) (reviewing a motion for an extension of time should take no more than a few minutes); *see also Sandoval v. Apfel*, 86 F. Supp. 2d 601 615-16 (N.D. Tex. 2000) (billing one quarter-hour to review short and basic documents is excessive). Thus, these 16 hours are denied.

On the other hand, an amount greater than the 45 hours suggested by the Commissioner is justified because this case involved a lengthy transcript of 376 pages, which was laden with years of medical records, many cryptic and time-consuming to review and piece together. Therefore, the court will specifically deduct 16.0 hours from the 125.75 submitted, and then apply an across-the-board reduction of 20 percent to the remaining 109.75, for a total of 87.8 hours to be reimbursed under the EAJA.

II. Expenses

Counsel for Pope also seeks reimbursement of $248.72 in expenses. Costs, as defined in 28 U.S.C. § 1920, may be awarded under the EAJA, as well as other reasonable expenses and fees incurred in litigation. *See* 28 U.S.C. §§ 2412(a)(1); 2412(d)(1)(A). The Commissioner requests that Few's claims for computer-assisted research, parking, mileage, and long-distance telephone calls be excluded as expenses not recognized under 28 U.S.C. § 1920. However, while the Commissioner would have the court read the statute as limiting the award of expenses to only those costs provided for in section 1920, the text of 28 U.S.C. § 2412(d)(1)(A) makes clear that "Except as otherwise specifically provided by statute, a court shall award to a prevailing party ... fees and other expenses, *in addition to any costs awarded pursuant to subsection(a)*, [i.e., in addition to those awarded in section 1920] incurred by that party in any civil action ..." 28 U.S.C. § 2412(d)(1)(A) (emphasis supplied). Therefore, the Commissioner's reliance on section 1920 as exclusive is misplaced.

The particular expenses the Commissioner challenges includes $31.25 that counsel seeks for reimbursement for postage, and $31.80 in travel expenses claimed by Few ($24.80 for mileage and $7.00 for parking). Federal courts, other than those in the Tenth Circuit, find postage and travel expenses are compensable under the EAJA, as long as such expenses are reasonable and necessary, and customarily charged to the client in the area the case is tried. *See generally* 4 Soc. Sec. Law & Prac. § 49:116. Since postage and travel expenses are normally charged to a client in the Houston area, the court will grant them. Expenses related to telephones and computer-assisted research are also compensable as long as they are costs that would normally be billed to a client. *See Nesvold v. Bowen*, 687 F. Supp. 443, 447 (N.D. Ind. 1988) (prevailing party under the EAJA is entitled to telephone, postage, and travel expenses); *Carmel v. Bowen*, 700 F. Supp. 794, 795 n.1 (S.D.N.Y. 1988) (cost of computer-assisted research can be recovered under the EAJA); *Garcia v. Bowen*, 702 F. Supp. 409, 411 (S.D.N.Y. 1988) (same). Thus, the court will grant the requested $248.72 in expenses.

Accordingly, Pope's motion for an award of attorney fees is GRANTED IN PART, with the modifications noted above. It is ORDERED that Gary W. Huddleston, counsel for Pope, be awarded the amount of $11,223.72 for attorney's fees and expenses incurred on behalf of representing Pope in this matter.

Signed on February 18, 2005, at Houston, Texas.

Stephen Wm. Smith
United States Magistrate Judge